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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 21, 2000

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket Nos. 96-98, 99-68; Comments Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit

Dear Secretary Salas:

Enclosed please find an original and four (4) copies of the Comments of Centennial Communications Corp. in the above-referenced proceeding.

Please address any questions to the undersigned.

Very truly yours,

Brenda J. Boykin

Brenda J. Boykin

cc: Attached Service List

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Remand of the Commission's Reciprocal Compensation Declaratory Ruling By the U.S. Court of Appeals For the D.C. Circuit	)	CC Docket Nos. 96-98, 99-68

To: The Commission

COMMENTS OF CENTENNIAL COMMUNICATIONS CORP.

Centennial Communications Corp. ("Centennial"), by its attorneys and pursuant to the Commission's Public Notice released on June 23, 2000 (FCC 00-227), submits these comments in the above-captioned proceeding. Centennial's subsidiaries operate as CMRS providers in eight states and Puerto Rico and as a wired competitive local exchange carrier (CLEC) in Puerto Rico. A number of Centennial's customers are Internet Service Providers (ISPs), for whom Centennial provides an alternative to the incumbent local exchange carrier (ILEC) for connecting to the public switched network. Many of the costs Centennial incurs in serving its ISP customers are actually caused by the ILEC's end users – that is, the consumers who call the ISPs Centennial serves. For this reason, Centennial is vitally interested in the legal and regulatory regime governing inter-carrier compensation for ISP-bound traffic.

1. Introduction and Summary

The last time the Commission addressed this issue, its hands were tied by the Eighth Circuit's erroneous conclusion that the agency had virtually no authority over state commissions under Sections 251 and 252 of the Communications Act. The resulting *Reciprocal*

Compensation Order,[1] Centennial believes, represented an attempt to maintain the status quo within the restrictions imposed by the Eighth Circuit. That is, the *Reciprocal Compensation Order* acknowledged that ISP-bound traffic was jurisdictionally interstate but strongly suggested that states continue to treat it as local.

The Eighth Circuit's decision has now been reversed, and the D.C. Circuit has remanded the *Reciprocal Compensation Order*. As a result, the Commission can address this issue with a clean slate.

So, what should the Commission do? Centennial submits that the answer is provided by the Commission's longstanding ESP Exemption. Under the ESP Exemption, calls to ISPs – whatever their jurisdictional status – are economically equivalent to local calls. The ESP Exemption allows ISPs to purchase normal business lines, which typically are priced so that there is no separate charge for incoming calls. From the caller's perspective, moreover, calls to ISPs are sent-paid – that is, like other "local" calls, the end user pays the originating carrier to get the call all the way to its destination. Thus, a CLEC serving an ISP has no billing relationship with the parties who originate the calls and no way to recover any of its costs from them.

The only parties from whom the CLEC can recover its costs are the ISP itself or the originating ILEC. Charging the ISP would almost certainly violate the ESP Exemption and would be economic suicide for the CLEC – its ISP customers would quickly move their business back to the ILECs, who would (pursuant to the ESP Exemption) continue to charge them normal business line rates.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Order*"), *reversed sub nom. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*D.C. Circuit Ruling*").

Recovering costs from the ILEC, on the other hand, makes perfect sense, both logically and economically. The ILEC's customers are the "cost causers" in this situation, and the ILEC alone is in a position to recover from them the costs it incurs in handling this traffic. Moreover, requiring inter-carrier compensation for this traffic would leave the ILEC and CLEC in a position to compete equally for the business of ISPs – a result that would serve the pro-competitive goals of the Telecommunications Act of 1996.

If intercarrier compensation for ISP-bound traffic makes sense from an economic and competitive standpoint, is there a legal basis for it? Centennial submits that there is. The only impediment to a ruling that this traffic was "local" and therefore subject to Section 251(b)(5) was the Eighth Circuit's erroneous decision, which has now been reversed. Moreover, the D.C. Circuit strongly suggested that this traffic is local. The court noted that there is no reason a call to an ISP cannot be both jurisdictionally interstate and, for purposes of regulation, local. It also noted that in an ISP-bound call, the ISP is "clearly the called party."

Freed of the erroneous Eighth Circuit decision, the Commission should conclude that ISP-bound traffic is local and is subject to the reciprocal compensation provisions of Section 251(b)(5).

2. The Commission Is Now Free to Regulate ISP-Bound Traffic Without the Eighth Circuit's Erroneous Decision in *Iowa Utilities Board v. AT&T.*

The Commission has long (and, Centennial submits, correctly) viewed ISP-bound calls as largely jurisdictionally interstate, but treated them as local. Shortly after the agency's receipt in 1997 of a letter requesting clarification of the status of ISP-bound traffic,[2] however, the Eighth

[2] *Reciprocal Compensation Order* at ¶ 1 n.1 (noting that ALTS requested clarification of the status of ISP-bound traffic for purposes of compensation by letter dated June 20, 1997).

Circuit issued its crabbed – and erroneous – view of Commission authority under the 1996 Act.[3] The Eighth Circuit held that the Commission essentially had no authority to implement Sections 251 and 252 of the Act.[4] This created a quandary for the Commission in its efforts to clarify the status of calls to ISPs. The agency had long believed that such calls were interstate but for just as long had directed that they be "treated as" local. Under the Eighth Circuit's ruling, however, the Commission could not direct states to treat ISP-bound traffic as local; at best it could only ***suggest*** that they do so.[5]

The *Reciprocal Compensation Order* reflects an attempt to escape this quandary. The Commission repeated its conclusion that ISP-bound traffic is jurisdictionally interstate but explained that "in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic."[6] The

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[3] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *reversed sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[4] 120 F.3d at 793-800.

[5] Although the Commission issued the *Reciprocal Compensation Order* after the Supreme Court had reversed the Eighth Circuit and affirmed the Commission's rulemaking authority with regard to Sections 251 and 252, it is clear that the *Reciprocal Compensation Order* does not reflect that newly reinstated authority in any way. First and foremost, the *Reciprocal Compensation Order* never even discusses the implications of the Supreme Court's ruling — the sole mention of it is as the last entry in the citation to the appellate history of the *Local Competition Order* in a footnote. *See Reciprocal Compensation Order* at ¶ 7 n.18. Second, while Centennial obviously cannot speak authoritatively about internal Commission procedures, there is objective evidence that the *Reciprocal Compensation Order* was essentially complete long before the Supreme Court ruled. Specifically, in the *GTE ADSL Order* issued in late October 1998 — three months before the Supreme Court's decision — the Commission publicly announced that the *Reciprocal Compensation Order* would be issued within a week. *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order*, 13 FCC Rcd 22466 (1998) at ¶ 2. Whatever the cause of the delay that then ensued, it is inconceivable that the Commission would have made such a statement if work on the *Reciprocal Compensation Order* were not substantially complete.

[6] *Reciprocal Compensation Order* at ¶ 26, n.87.

Commission then set out a list of factors and considerations for states to use in determining whether compensation is due for this traffic.[7] The Commission's list strongly suggests that states should conclude in all but the most unusual cases that compensation is due.[8]

The Supreme Court has now reversed the Eighth Circuit and has made clear that the Commission has authority to issue rules regarding all matters covered by Sections 251 and 252.[9] The D.C. Circuit, moreover, has vacated the *Reciprocal Compensation Order* and ruled that the approach it established -- deference to ***state*** commissions with respect to jurisdictionally ***interstate*** traffic -- is "intuitively backwards."[10] As a result, the Commission is now free to

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[7] *Id.* at ¶ 24. The Commission suggested, for instance, that state commissions construing interconnection agreements consider "whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs" and "whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic."

[8] In fact, most states that have addressed the issue of intercarrier compensation for ISP-bound traffic, both before issuance of the *Reciprocal Compensation Order* and after, have concluded that compensation is due.

[9] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 385. The Court held that:

> We reverse the Court of Appeals' determinations that the Commission had no jurisdiction to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rural exemptions, and regarding dialing parity. . . . None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions to rural LECs, . . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments.

See also id. at 378 n.6 ("The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any 'presumption' applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange") (emphasis in original).

[10] *D.C. Circuit Ruling*, 206 F.3d at 6.

examine this issue without the Eighth Circuit's artificially cramped view of the agency's authority. It has, in essence, a clean slate.

3. Regardless of Their Jurisdictional Status, ISP-Bound Calls are Economically Local.

The Commission's ESP Exemption, which has helped to make the United States one of the leaders in the development of consumer access to the Internet, also dictates the correct result in this proceeding. The ESP Exemption means that regardless of their jurisdictional status, calls to ISPs are ***economically*** "local." The purpose and effect of the ESP Exemption is to allow ISPs to connect to the public switched network just like normal business end users. For that reason, the Exemption allows ISPs to purchase intrastate-tariffed local business lines, which typically are priced so that there is only a flat rate charge for incoming calls, and to use those lines to receive local calls from their customers.

A CLEC completing calls to its ISP customers incurs costs, including the costs involved in switching the calls to the proper ISP loop. Unlike toll calls, however, in which the calling party pays a long distance carrier for end-to-end service (and the long distance carrier pays access charges to originating and terminating LECs), ISP-bound calls are sent-paid. This means that the calling party (who is also the cost causer) pays the originating carrier for getting the call all the way to the ISP. These payments take the form of local service charges, the details of which vary from customer to customer and state to state. In contrast to a toll calling situation, the carrier actually handling the second leg of the call has no relationship with the calling parties and cannot bill them for the service they (indirectly) receive when they dial into their ISPs.

This leaves two choices for the interconnected CLEC. One is to assess the ISP per-minute charges to pay for that service. Such a policy would almost certainly violate the ESP Exemption, which gives ISPs the right to purchase normal, intrastate tariffed business lines. It

also would cripple competition in the market for service to ISPs. Centennial competes for the business of its ISP customers by providing them better service and rates than they were receiving from the ILEC and presumes that this is precisely the sort of competition the 1996 Act is intended to encourage. If Centennial or any other CLEC attempted to recover the costs it incurs in switching interconnected traffic to its ISP customers, it would quickly find that it has no more such customers. Because of the ESP Exemption, ISPs would have the option to purchase service out of the ILECs' intrastate end user tariffs and would find these rates substantially lower than the CLEC's usage-sensitive rates. ISPs would quickly migrate back to the ILECs, and competition in the market for service to ISPs would come to an end.

The only other choice, and the only one that makes economic sense, is to charge the originating carrier for the service provided to the originating carrier and its customers. The originating carrier is in a position to ensure that it gets enough revenue from its end users (who are, after all, the cost-causers) to cover the charges from the interconnected carrier. And a charge to the originating carrier would put the interconnected carrier on an equal footing with the originating carrier in competing for the business of ISPs. That is, each would be free to offer its services to ISPs on a comparable basis (i.e., a business rate that covers the cost of the ISPs' loops and outgoing usage) and to compete on the basis of price and quality (including enhancements such as collocation, that ISPs find valuable for various reasons).

4. The Commission Should Conclude That ISP-Bound Calls Are "Local" and Are Subject to Section 251(b)(5).

The only approach that both preserves competition in the market for serving ISPs and is likely to survive further review by the D.C. Circuit is a conclusion that ISP-bound traffic is

"local" for purposes of the reciprocal compensation obligation at Section 251(b)(5) of the Act.[11] As noted above, the ESP Exemption means that a contrary ruling would make it impossible for CLECs to compete with ILECs for the business of ISPs.

A conclusion that ISP-bound traffic is subject to Section 251(b)(5) also would be likely to survive further scrutiny from the D.C. Circuit, which Centennial believes is inevitable in this matter. The key legal error that the Commission committed and that the court found objectionable was to confuse the jurisdictional status of a call (interstate versus intrastate) with the status of a call as toll or local. Under the Communications Act, a communication is "interstate" if it meets the definition of "interstate communication" in 47 U.S.C. § 153(22). A communication is "local" if it meets the definition of "telephone exchange service" in 47 U.S.C. § 153(47). The statutory "opposite" of an interstate communication is an intrastate communication. The statutory "opposite" of a local ("telephone exchange service") call is a toll call. Just as there can be intrastate and interstate toll calls (e.g., a call from Northern Virginia to Roanoke, Virginia, versus a call from Northern Virginia to New York City), there can be intrastate and interstate local calls (e.g., a call to a local pizza parlor on a landline network, versus a call from Northern Virginia to Washington, D.C.). In other words, the Commission's specific conclusion in footnote 87 of the *Reciprocal Compensation Order* that ISP-bound calls are non-local because they are interstate is a *non sequitur*.

Centennial concedes that ISP-bound calls are somewhat unusual. (They would not be so controversial if they were "normal" in all respects.) But there is nothing illogical or unreasonable about holding that ISP-bound calls meet the definition of "interstate"

[11] 47 U.S.C. § 251(b)(5).

communications and, at the same time, meet the definition of "local" (i.e., "telephone exchange service") calls.

Indeed, that appears to be the only answer that will survive further scrutiny by the D.C. Circuit. After ruling that the jurisdictional status of ISP-bound traffic does not determine its regulatory status, the court noted that the Commission has defined "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises."[12] The court held that "[c]alls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, ***which is clearly the 'called party.***'"[13]

Centennial believes that such a result is, indeed, the correct answer. Under the ESP Exemption, the ISP purchases local business telephone service, with normal local telephone numbers associated with that service. Calls to those numbers should be treated as "local" or "toll" for intercarrier compensation purposes based on the calling plan of the party making the call. If the calling party can reach the ISP's number as a local call, then the call is an instance of "telephone exchange service" and should be treated as "local." If, however, the end user is assessed a toll charge for reaching the ISP's number, then the call is an instance of "telephone toll service."[14]

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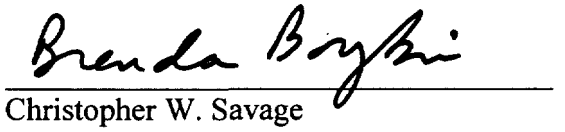
[12] *D.C. Circuit Ruling,* 206 F.3d at 6 (quoting 47 C.F.R. § 51.701(b)(1)).

[13] *Id.* (emphasis added).

[14] "Telephone toll service" is defined at 47 U.S.C. § 153(48). In this instance, because the CLEC serving the ISP is the entity delivering the call to the "called party" (i.e., the ISP), the logical compensation arrangement is for the ILEC delivering the call to the CLEC and rendering the "toll" service to pay the CLEC terminating access charges for the work it has performed in

Finally, because ISP-bound traffic is properly classified as "local," the Commission should reaffirm its conclusion in the 1996 *First Report and Order on Local Competition* that compensation rates for this traffic should be set on the basis of costs the ILEC incurs to perform thees functions – that is, the call termination rate paid to CLECs should be based on the ILECs' costs.[15]

Respectfully submitted,



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Date: July 21, 2000

completing the call. This would likely be a higher per-minute rate than any applicable "local" call termination charge.

[15] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996) at ¶ 1085.

CERTIFICATE OF SERVICE

I, Linda M. Blair, a secretary with the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that I have this 21st day of July 2000, caused the foregoing Comments of Centennial Communications Corp., in the CC Docket Nos. 96-98, 99-68 proceeding, to be served by hand delivery, upon the following:

Ms. Magalie Roman Salas
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